In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 114

HENRY A. B. DUNNING, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority and minority opinions in the Board of Tax Appeals (R. 9–22) are reported in 41 B. T. A. 1101. The opinion and dissenting opinion in the Circuit Court of Appeals (R. 68–78) are reported in 118 F. (2d) 341.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 10, 1941 (R. 78–79). The petition for a writ of certiorari was filed May 31, 1941. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1932 the taxpayer created trusts for the benefit of his wife and children, naming himself and a trust company as trustees. The property transferred in trust consisted of shares of stock of a corporation of which taxpayer was the president and controlling stockholder. Under the trust terms, he reserved the right alone to vote the stock, to sell the same, and to select reinvestments; also to direct the disposition of income in excess of stipulated amounts payable to his wife. He also reserved the right to terminate the trusts in January 1937. He actually did this and the corpora were returned to him in accordance with the provisions of the trust instruments. The taxpayer conceded taxability as to the portion of income paid to his wife and used by her to pay premiums on policies of insurance on his life. Is he also taxable under Sections 166 and 22 (a) of the Revenue Act of 1934 on the balance of the income of the trusts for 1934?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 10–16.

STATEMENT

The facts found by the Board of Tax Appeals (R. 10–12), supplemented by other stipulated

facts (R. 46–59, 23–30, 39–45), may be summarized as follows:

On May 31, 1932, the taxpayer executed five deeds of trust to the Maryland Trust Company and himself, as trustees, conveying stock in Hynson, Westcott & Dunning, Inc., to be held in trust for the benefit of his wife and children (R. 10).

Taxpayer was president and chief stockholder of Hynson, Westcott & Dunning, Inc., being the owner of approximately 95 percent of all its outstanding stock (R. 46, 48).

Under the terms of the trusts, the taxpayer reserved the right alone to vote the stock placed in trust as well as the sole right to buy or sell any securities or other assets making up the trust estates (R. 24–25, 28, 49).

Each of the trust deeds contained the following additional provisions (R. 10–11, 25–26):

> This deed of trust shall continue in full force and effect *irrevocable in all respects* until January 10, 1937, and, subject to the exceptions hereinafter stated, shall terminate on that date, if Henry A. B. Dunning, by written notice to his co-trustee on or before December 31, 1936, declares that he desires no extension of said date of termination. If no such notice is given the above date of January 10, 1937, shall automatically be extended to January 10, 1942, and thereafter during the life of Henry A. B. Dunning from time to time the date of termination shall be automatically ex-

tended for successive periods of five years each if no notice as above specified be given ten days before the end of any current five year period. Upon any termination of the trust the corpus of the estate (but not the accumulated income) shall revert to Henry A. B. Dunning, to be his absolutely.

The trust shall furthermore continue after January 10, 1937, or after the end of any subsequent five year extension in either of the following events:

(a) If Henry A. B. Dunning dies before January 10, 1937, or before the end of any five year extension of said date which may become effective, then the trust both as to corpus and accumulated income shall continue from the day of his death upon the terms and for the period hereinafter fully set forth.

(b) If Henry A. B. Dunning is living on January 10, 1937, and the trust then terminates as to the corpus, or if at the end of any five year extension of said date which may become effective, the trust then terminates as to the corpus, then the trust as to the accumulated income shall nevertheless continue from said date upon the terms and for the period hereinafter fully set forth.

Each deed further provided that $10,000 of the yearly income from the corpus should be paid to the settlor's wife, Ethel Adams Dunning. The surplus income was, in the discretion of Henry A. B. Dunning as trustee, either to be accumu-

lated or paid to various named beneficiaries, not including Henry A. B. Dunning. As the quoted provisions indicate, if any trust were terminated as to corpus, or if the settlor died prior to January 10, 1937, the accumulated income was to continue in trust upon terms thereinafter set forth. If the settlor died before January 10, 1937, or before the expiration of any succeeding five-year period, regardless of notice of earlier termination by the settlor, each trust was to continue both as to corpus and income upon those same terms. These terms were, in substance, that the trust was to continue for 21 years after the death of the last survivor of the wife and four named children, and the trust property was thereupon to be divided among the then living issue of the children of the settlor (R. 11–12).

In 1934 the taxpayer's wife received $50,000 from the five trusts and expended it as follows (R. 12):

Premiums on policies of life insurance	$30,586.56
Household expenses	7,310.00
Charities	2,353.00
Income tax	4,718.26
For the benefit of her daughter, Catherine Kersten	3,510.00
For the benefit of her son, H. A. Brown Dunning	825.00
For the benefit of her son, Charles Alexander Dunning	750.00

Taxpayer's wife spent the above sum of $30,586.56 in paying premiums on insurance on his life, at his suggestion (R. 12).

On December 29, 1936, taxpayer terminated the trusts in accordance with the provisions therein contained, and the *corpora* were returned to him.

The investments, comprising accumulated income, were not returned to him, however, nor did he receive any of the trust income for 1934 (R. 12).

The Commissioner attributed all of the income for 1934 of all of the five trusts, including the above amount received and expended by taxpayer's wife, to the taxpayer for that year (R. 12).

In the proceedings before the Board of Tax Appeals, the taxpayer conceded that he was taxable under Section 167 of the Revenue Act of 1934 on the portion of the 1934 trust income ($30,586.56) used to pay premiums on policies of insurance on his life, but contested taxability as to the balance of the trust income (R. 12–13).

The Board sustained the taxpayer; but the court below reversed the decision of the Board.

ARGUMENT

1. The court below held (R. 74) that the instant trusts fall squarely within the scope of Section 166 of the Revenue Act of 1934 (Appendix, *infra*), which provides that where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested in the grantor, then the income of such part of the trust shall be included in computing the net income of the grantor. We submit that the decision is clearly correct, since the taxpayer-grantor reserved the right to revoke the trusts as of January 10, 1937, by giving notice on or prior to December 31, 1936; and if he

failed to give such notice the trusts would continue in accordance with their terms for 21 years after the death of the last survivor of the wife and four named children, whereupon the trust properties were to be divided among the then living issue of the children, subject, however, to the power of the grantor to revoke at the expiration of successive five year periods during his lifetime.

It is true that in *Helvering* v. *Wood,* 309 U. S. 344, upon which the taxpayer relies (Pet. 4–5; Br. 12–13, 27), this Court held that the grantor was not accountable under Section 166 for income of a trust for a short term of years at the expiration of which the corpus was to revest in him. But that case is distinguishable from the instant one because here the grantor had to give the required notice in order to get the property back (if, indeed, he may properly be said ever to have given it up, *Helvering* v. *Clifford,* 309 U. S. 331), and if he failed to give such notice, then the trusts were to continue in accordance with their terms. This distinction between a reversion and a power to revest, drawn in the *Wood* case, *supra,* pp. 346–347, was specifically noted by the court below (R. 74, 77) which concluded that the grantor here had a power of revocation and not merely a reversionary interest.

The instant decision is in accord with the decisions of other Circuit Courts of Appeals (*Reuter* v. *Commissioner,* 118 F. (2d) 698 (C. C. A. 5th);

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Kraft v. *Commissioner,* 111 F. (2d) 370 (C. C. A. 3d), certiorari denied, 311 U. S. 671), and is not in conflict with the rule of decision in any other circuit.

Corning v. *Commissioner,* 104 F. (2d) 329 (C. C. A. 6th), relied upon by the taxpayer (Br. 16–17), was adequately distinguished by the court below (R. 73) on the ground that the power there was contingent upon the death of the grantor's father, whereas the power here was subject to no such contingency. Moreover, the Sixth Circuit itself now regards the *Corning* decision as doubtful. See *Altmaier* v. *Commissioner,* 116 F. (2d) 162, 165 (C. C. A. 6th) certiorari denied, March 31, 1941, No. 774, October Term, 1940.

2. In the court below, we urged in the alternative that the grantor was also taxable under Section 22 (a) because he remained in substance the owner of the trust properties. *Helvering* v. *Clifford, supra.* The court's application of Section 166 made it unnecessary to consider the question as to Section 22 (a) (R. 77). But since the point was properly raised in the court below even if not urged before the Board (*Hormel* v. *Helvering,* No. 257, 1940 Term, decided March 17, 1941; *Helvering* v. *Richter,* No. 516, 1940 Term, decided March 17, 1941), the essential similarity between the *Clifford* case and the one at bar may be pointed out. Here the grantor had the power to revoke the trusts at the expiration of a short period of less than five years; the beneficiaries

were members of the grantor's family, namely, his wife and four children, one of whom was a minor during the taxable year (R. 48); and the grantor as trustee reserved broad powers of control over the trust properties, including the sole rights to vote the stock of a company of which he was president and the controlling stockholder (see *Helvering* v. *Fuller,* 310 U. S. 69, 76), to sell securities of the trusts, to select reinvestments and to determine whether income in excess of a stipulated amount payable to the wife should be currently distributed to the beneficiaries or accumulated in the trusts.

We therefore submit that the grantor is properly accountable for the trust income in question under Section 22 (a), as well as Section 166 of the Revenue Act of 1934.

CONCLUSION

The decision below is correct. There is no conflict. The petition should be denied.

Respectfully submitted.

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